(3)

No. 90-324

Supreme Court, U.S.
FILED
DEC 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC. d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

KENNETH O. HICKS,
Respondent.

REPLY BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pursuant to Rule 15.6, Rules of the Supreme Court of the United States, Petitioner submits the following Brief addressed to arguments first raised in the Brief in Opposition to the Petition For Writ of Certiorari pending herein.

SUMMARY OF ARGUMENT

Respondent urges this Court to refrain from making pronouncements on the scope and meaning of Section 1981 for the reason that Congress *may* pass legislation which, if adopted, would "clarify" the scope of Section 1981 to make it clear that discriminatory discharge is covered by the statute. Notwithstanding this wholly speculative

reliance on potential legislative change, Respondent nevertheless also urges this Court to leave undisturbed the Eighth Circuit's decision in this case because this Court's decision in *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989) did not address the question whether racially motivated firing runs afoul of Section 1981 and because the decision below is correct on the merits.

Petitioner must counter this argument by suggesting that this Court's decision on the merits herein would not only clarify the scope and meaning of Section 1981 in light of *Patterson* but could potentially obviate in part the call for the sweeping legislative change relied upon by Respondent. The legislation upon which Respondent grounds his appeal for judicial restraint certainly treats *Patterson* as having decided the issue whether racially motivated termination is actionable under Section 1981 (and such legislation has as an express purpose retrospective overruling of *Patterson*) in a fashion contrary to Respondent's view of the correctness of the decision below. In short, the question presented by this case is whether *Patterson* reaches the question of discriminatory discharge and whether the Eighth Circuit's decision construing Section 1981 to cover racially motivated discharge decisions is in harmony with *Patterson*. Because all other circuits addressing the question have reached a result contrary to the Eighth Circuit's decision herein, this Court's decision on the merits of this case would clarify the meaning of *Patterson* both for the judiciary and for Congress.

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT DISCHARGE FROM EMPLOYMENT INVOLVES THE RIGHT TO "MAKE" A CONTRACT, ACTIONABLE UNDER SECTION 1981, HAS ALREADY BEEN REJECTED BY THIS COURT.

Respondent claims this court neither addressed nor decided the question whether Section 1981 covers claims of racially motivated discharge decisions in *Patterson*, yet Respondent argues vigorously that Section 1981 could not be read to exclude discharge decisions from its coverage. Despite Respondent's assertion (Brief in Opposition at 6-7) that he does not seek to "strain" the meaning of the right to "make" a contract of employment by construing such right to include protection against the "unmaking" of the contract (so as to bring discharge decisions within the ambit of Section 1981's protection of the right to "make", rather than to "enforce", contracts), Respondent's argument, that every discharge from employment involves both a termination of contract *and* failure to contract anew, serves only to "twist" and "torture" the language of Section 1981 in order to achieve the desired result. This Court was confronted with similar arguments and analytical efforts in *Patterson* (Part C) as advanced by the Solicitor General and Justice Brennan. In particular, this Court rejected Justice Brennan's argument that pervasive racial harassment in the terms or conditions of employment can rise to the level of an employer's refusal to make a contract. This Court emphatically stated:

> "However, and this is the crucial point, the question under §1981 remains whether the employer, *at the time of the formation of the contract*, in fact intentionally refused to enter into a contract with the employee on racially neutral terms." (Emphasis in original.)

Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363 at ___.

Respondent's effort here to bootstrap a challenge to the circumstances surrounding an employer's decision to discharge an employee into a claim under §1981 that the employer refused to offer the

discharged employee the "same right to . . . make" a contract is no different than an effort to transform a "pervasive harassment" claim into a "refusal to contract" claim already soundly rejected in *Patterson*.

Moreover, while Respondent urges that any other reading of the language of Section 1981 would result in wholesale subversion of the rights bestowed by that legislation, only the right to make and to enforce contracts is established therein. This Court, contrary to both Respondent's and the Eighth Circuit panel's analysis of the legislation history, has already held that "the legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). To say in light of such analysis that Congress intended by the bare language of Section 1981 to permit every discharged employee to claim subversion of his "same right to make" a non-discriminatory contract for hire, for wages for labor, strains beyond recognition the meaning of Section 1981.

Accordingly, this Court should grant the Petition for Writ of Certiorari herein in order to properly interpret the limits of the scope of protections afforded by Section 1981, particularly in light of this Court's analysis in *Patterson*.

II. THIS COURT IS NOT CONSTRAINED IN INTERPRETING SECTION 1981 AND APPLYING THE INTERPRETATION OF SECTION 1981 ENUNCIATED IN *PATTERSON* BASED UPON THE POSSIBILITY OF FUTURE LEGISLATIVE EFFORTS WHICH MAY OR MAY NOT BECOME LAW.

Respondent urges this Court to exercise judicial restraint and exhibit regard for Congress by declining to interpret Section 1981, in light of *Patterson*, in this case because (a) Congress *may* pass legislation, which *may* or *may not* become law, declaring anew the scope of Section 1981 and (b) the *Patterson* decision, only sixteen months old, has not been applied to claims of discriminatory discharge in all the circuits. On the one hand Respondent argues that judicial restraint is required because of what the law *may* become through legislation

and, on the other, he advocates judicial restraint because the *current* law has not been fully developed by all the circuits on the scope of *Patterson*. Clearly lurking under each of Respondent's claimed basis for judicial restraint is the compelling suggestion that the scope of *Patterson* needs to be addressed by this Court, in order to guide *both* the judiciary and the Congress from premature and/or unnecessary actions. According to Respondent, *Congress* is of the view *Patterson* does interpret Section 1981 to exclude discriminatory discharge claims from its coverage (even though Respondent also claims the issue was neither addressed nor determined and that any such reading of the scope of current Section 1981 renders the statute a virtual nullity) and the lower federal courts — while predominately of the same view — must be given additional time to develop the law of *Patterson*, even though, according to Respondent, any such judicial action will be rendered "functionally moot" if the Congress seeks in the next session and succeeds in passing legislation which would retrospectively overrule *Patterson*.

The Court is ever mindful of the Congress' power in the area of statutory interpretation, and acts in this area with knowledge that Congress remains free to alter what the Court may do. However, no special justification exists in this case constraining the court from interpreting Section 1981, particularly in light of *Patterson*: there has been *no* intervening development of the law, through extant action by Congress, which renders this Court's decision in *Patterson* unworkable or confusing. To the contrary, the Civil Rights Act of 1990 did not become law and any analysis of any possible legislative efforts is idle speculation. Respondent's plea to this Court for judicial restraint in an area where Congress *may* act could essentially be argued in *any* case involving statutory interpretation: this Court should stay its hand because the Congress has the *power* to act to legislate change in the statutory area presented for consideration. This Court's discretionary jurisdiction — and independence — is not so trammeled in this federal system.

Moreover, any possible subsequent legislative act does not render the current conflict existing in the circuits over the scope of Section

1981 as most recently interpreted in *Patterson* insignificant. Respondent suggests that this Court should deny the Petition for Writ of Certiorari in this case, as it recently did in *Sherman v. Burke Contracting, Inc.*, No. 90-5322 (Petition For Writ of Certiorari denied October 29, 1990), implying that the basis for this Court's denial of the Petition For Writ in *Sherman* was the insufficiency of conflict presented. Again, Respondent engages in rank speculation: as cited in Petitioner's original filing in this case (*see* Petition For Writ of Certiorari at p. 10), in *Sherman*, the Eleventh Circuit held that a claim of "retaliation" does *not* implicate the right to make a contract protected by Section 1981 — a holding consistent with Petitioner's reading of *Patterson* and the reading of the majority of the Circuits which have addressed the issue. Accordingly, this Court may have declined the Petition for the reason it considered the Eleventh Circuit's view correct. *See also Rodriguez v. General Motors Corp.*, No. 90-648 (Petition For Writ of Certiorari denied November 26, 1990) (Ninth Circuit held denial of promotion and demotion claims not actionable under Section 1981, applying *Patterson* racial harassment analysis).

Clearly, this Court recognizes its role to interpret what Congress may do and has done in the areas of private discrimination, to which the ordinance of the Constitution does not directly extend. *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363 at ___, 105 L.Ed.2d 132 at ___ (1989). However, Congress has done nothing to change the law as interpreted in *Patterson* and the question whether the Eighth Circuit's decision in this case failed to follow *Patterson* thereby revealing a true and significant conflict within the circuits merits issuance of the Writ of Certiorari herein.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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